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In the Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS J. BOWIE, JR.
SPECIALIST FIVE, UNITED STATES ARMY,
PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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36 pp

QUESTIONS PRESENTED

1. WHEN must an accused be advised of his right to proceed *pro se* under the sixth amendment and 28 U.S.C. § 1654?

2. WHETHER an accused, who has clearly and unequivocally discharged his counsel, and who was then denied an opportunity to obtain other counsel, must be advised of his constitutional and statutory right to self-representation in order for him to knowingly and intelligently exercise or waive that right?

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THOMAS J. BOWIE, JR.
SPECIALIST FIVE, UNITED STATES ARMY,
PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Thomas J. Bowie, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 21 M.J. 453 (C.M.A. 1986) (Appendix A). The opinion of the Army Court of Military Review appears at 17 M.J. 821 (A.C.M.R. 1984) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 31, 1986, affirming petitioner's conviction dated February 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

28 U.S.C. § 1654 provides:

"In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

STATEMENT OF THE CASE

On December 11, 1981, the petitioner appeared at a pretrial session in Germany accompanied by his two appointed military defense counsel, Captain (CPT) James M. Coyne and CPT Herbert A. Irish (R. 2). At this session the military judge advised the petitioner of his right to counsel (R. 3-4).[1] Attempting to exercise his right to military counsel of choice the petitioner requested that he be represented by CPT Richard Boone (R. 4). The request was denied because it was determined that CPT Boone, a chaplain, was not a licensed attorney, and thus, was precluded from representing the petitioner.[2] The petitioner then expressed his desire to obtain a civilian lawyer to represent him (R. 9). The military judge scheduled petitioner's court-martial for January 28, 1982 (R. 13).

Prior to the scheduled trial date, a new military judge was detailed to the petitioner's court-martial and CPT Irish, the detailed assistant defense counsel, was excused from the petitioner's case. The petitioner attempted to retain a civilian attorney from Frankfurt without succuss (R. 21-22). Petitioner

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[1] Article 38(b), Uniform Code of Military Justice, 10 U.S.C. § 838(b)(1976) provides an accused the right to representation by military counsel, either appointed ("detailed") or of his choice if reasonably available. An accused may also hire civilian counsel at his own expense with the option of retaining his military counsel on the case.

[2] Article 27, Uniform Code of Military Justice, 10 U.S.C. § 827 (1976) and its implementing regulations, require, in a general court-martial or a special court-martial empowered to adjudge a bad-conduct discharge, that defense counsel be qualified as a lawyer. *See also* Paragraph 48*a*, Manual for Courts-Martial, United States, 1969 (Rev. ed.).

then requested and was assigned CPT Randall W. Pretzer as individual military defense counsel (R. 17). Pursuant to CPT Pretzer's request, the military judge granted a continuance until February 16, 1982.

When the court-martial reconvened on February 16, the petitioner was represented by CPT Pretzer and CPT Coyne (R. 17). After advising the petitioner of his counsel rights, the military judge asked the petitioner if he was satisfied to have those two counsel act as his only attorneys (R. 19). The petitioner replied "no" and explained that he had witnesses who had not yet been interviewed by defense counsel (*Id.*). In response, CPT Pretzer stated:

> Your Honor, I've interviewed numerous witnesses on this case and made an effort to contact some of those people in the States and with no avail. *I had my own philosophy on this particular case and theory which I want to pursue and I've tried to discuss this with Specialist Bowie and have gotten nowhere whatsoever. He has told me as of this last Friday that he did not want my services anymore. Since I have been somewhat if you will fired by the man, I feel no need to represent him anymore and I request at this time to be excused from the case.*

(R. 19-20) (emphasis added). CPT Pretzer also stated that he was prepared to go to trial on that day and that he had sufficient time and opportunity to discuss the case with the petitioner and relevant witnesses (R. 20). CPT Coyne, however, stated that he lacked adequate opportunity to prepare the case and submitted to the court two documents in which petitioner, on February 5, 1982, released CPT Coyne and CPT Irish as defense counsel (R. 20).

The military judge then determined that petitioner had made an unsuccessful attempt to retain a civilian lawyer from Frankfurt and had also contacted another law firm by leaving a message on the firm's phone message recording (R.21-23). The petitioner's request for a continuance in order to hire a civilian attorney was denied (R. 23). Despite CPT Coyne's admission of unpreparedness[3] and CPT Pretzer's express at-

[3] It was also revealed during the sentencing portion of trial that CPT Coyne had conducted a supervisory review, pursuant to Article 65(c),

tempt to disassociate himself from his legal obligations to the petitioner, the military judge ordered the petitioner to proceed to trial (*Id*). He ruled that the petitioner was represented by qualified counsel and stated:

> Additionally I'd add to that I strongly urge you to cooperate with their assistance, the assistance that they're going to be providing you and the assistance they are providing you. They can help you alot [sic] I'm sure in this case.

(*Id*).

Pursuant to petitioner's request he was tried by military judge alone. During the presentation of the government's case-in-chief, CPT Pretzer informed the military judge that a civilian attorney, through the petitioner's wife, left a message with the court personnel that he was interested in representing the petitioner (R. 60). Construing this as a request for a continuance, the military judge confirmed with defense counsel that the petitioner had not actually spoken with the attorney and denied the motion (R. 60-61).

Evidence on the merits included testimony from seven prosecution witnesses. The petitioner testified in his own behalf. Examination and cross-examination of the witnesses and argument were conducted by CPT Pretzer, with CPT Coyne present at all times. The petitioner took the witness stand twice. When he expressed his desire to testify a second time, CPT Pretzer responded to the military judge's inquiry as to the relevance of the petitioner's testimony by stating "we do not believe it's relevant but he continues to want to testify" (R. 85). When the petitioner resumed the stand he elaborated on his prior testimony and concluded by stating:

Uniform Code of Military Justice, 10 U.S.C. § 865(c)(1976), of petitioner's previous court-martial and conviction and had signed the promulgating order which published the results. This promulgating order was admitted into evidence as a matter in aggravation prior to sentencing. The Army Court of Military Review indicated that CPT Coyne should have disclosed this information in open court and the military judge should have inquired into the matter; however, the Army Court determined that these were not prejudicial errors. United States v. Bowie, 17 M.J. 821, 825 (A.C.M.R. 1984).

> Sure, I'm the only one in court. I don't have no witness, right, because maybe my lawyer said they're not helpful, you know. Sure, they [sic] are party [sic] he haven't talked to and there are parties that are not here stateside [sic] but there's alot [sic] of things that can be brought out that would be brought out but I'm the only one here and my superiors used no tact in dealing with me.

(R. 87-88).

Petitioner was found guilty of all charged offenses and sentenced to a bad-conduct discharge, confinement at hard labor for four months, forfeiture of $367.00 pay per month for four months, and reduction to the rank of Private E-1. On January 30, 1984, the Army Court of Military Review affirmed the findings and sentence. *United States v. Bowie*, 17 M.J. at 830.

The questions presented in this petition have been fully litigated at every stage of the appellate process. The issue specified by the United States Court of Military Appeals, as a prerequisite to the Court's jurisdiction, was as follows:

> WHETHER THE MILITARY JUDGE ERRED TO ACCUSED'S PREJUDICE BY FAILING TO APPRISE HIM HE HAD A RIGHT TO REPRESENT HIMSELF, WHEN ADVISED THAT ACCUSED HAD DISCHARGED BOTH HIS APPOINTED COUNSEL AND HIS INDIVIDUAL MILITARY COUNSEL OR SECURE HIS AFFIRMATIVE CONSENT TO CONTINUED REPRESENTATION BY ONE OR ALL OF THE STATED COUNSEL.

REASONS FOR GRANTING THE WRIT

In the seminal case of *Faretta v. California*, 422 U.S. 806 (1975), the Court held that self-representation was a fundamental, independent, constitutional right under the sixth amendment that may not be abrogated by forcing counsel upon an unwilling defendant. While *Faretta* established the nature of the right of self-representation, the full scope of this basic right awaits further judicial definition. The *Faretta* decision left several significant procedural questions unanswered, including the question of when must a defend-

ant be advised of his right to proceed *pro se*.[4] The instant petition presents the Court with the opportunity to answer that crucial question.

I. THE REPRESENTATION BY COUNSEL WHOM PETITIONER HAD CLEARLY AND UNEQUIVOCALLY DISCHARGED PRIOR TO TRIAL WAS FORCED UPON PETITIONER IN CONTRAVENTION OF *FARETTA v. CALIFORNIA* AND 28 U.S.C. § 1654.[5]

Based on the long-standing recognition of a right of self-representation in federal and most state courts, and on the language, structure, and spirit of the sixth amendment, the holding in *Faretta* was an affirmation of "a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." *Faretta v. California*, 422 U.S. at 817. The right to defend is a personal right.[6] Recognizing that it is the accused who suffers the consequences if the defense presented at trial fails, the Court stated:

> The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the de-

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[4] "[T]he opinion leaves open a host of other procedural questions. Must every defendant be advised of his right to proceed *pro se*? If so, when must that notice be given?" Faretta v. California, 422 U.S. at 852 (Blackmun, J., dissenting).

[5] Petitioner's right to proceed *pro se* is not at issue since the court below held that military accused does have the right to self-representation at a court-martial. It appears that the holding was based on the constitutional right, as established in *Faretta*, rather than the statutory right under 28 U.S.C. § 1654, which petitioner contends is equally applicable to the military accused given that military courts are courts of the United States. Petitioner's position with respect to the questions presented is the same whether the right to self-representation is based on the sixth amendment or 28 U.S.C. § 1654. Furthermore, as the court below noted, the Manual for Courts-Martial does recognize the right to self-representation but does not impose any obligation on the military judge to advise the accused of that right. United States v. Bowie, 21 M.J. 453, 456 (C.M.A. 1986), *citing* Paragraph 48*a*, Manual for Courts-Martial, United States, 1969 (Rev. ed.).

[6] "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Faretta v. California, 422 U.S. at 819.

> fendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."

Faretta v. California, 422 U.S. at 834, *quoting, Illinois v. Allen*, 397 U.S. 337, 350-351 (1970) (Brennan, J., concurring). Control and management of his defense must necessarily rest with the accused.[7] A defendant who knowingly, intelligently, and voluntarily elects to defend himself is constitutionally entitled to refuse the services of a government-appointed attorney and to develop and present his own defense. *Faretta v. California*, 422 U.S. at 835-836. When counsel is thrust upon the accused against his desire, then "counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the [Sixth] Amendment insists." *Faretta v. California*, 422 U.S. at 820 (footnote omitted).

Just as in *Faretta*,[8] the petitioner was denied the opportunity to obtain counsel other than the two attorneys who were present at trial (*See* R. 23, 60-61). The petitioner had released both CPT Coyne and CPT Pretzer from further participation in this case *prior* to trial. Captain Coyne stated on the record that he lacked adequate opportunity to prepare the case (R. 20). Despite his stated readiness to proceed to trial that day, CPT Pretzer requested excusal from the case in conformity with the petitioner's desire (*Id.*). The military judge, nevertheless, proceeded to trial with both CPT Coyne and CPT Pretzer representing the petitioner (*See* R. 23).

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[7] In McKaskle v. Wiggins, 465 U.S. 168 (1984), *reh'g denied*, 465 U.S. 1112 (1984), where the issue of the role of standby counsel was addressed, the Court delineated the specific rights encompassed in the right to self-representation, to include the defendant's ability to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial. *Id.* at 174.

[8] Faretta's three motions for appointment of a lawyer other than the public defender were denied. Faretta v. California, 422 U.S. at 810 n. 5.

Clearly, the representation of CPT Coyne and CPT Pretzer was forced upon the petitioner. To force representation upon an unwilling defendant "can only lead him to believe that the law contrives against him." *Faretta v. California*, 422 U.S. at 834.

II. SINCE PETITIONER AT NO TIME ACQUIESCED IN THE REPRESENTATION FORCED UPON HIM, THE DEFENSE PRESENTED AT TRIAL WAS NOT *HIS* DEFENSE.

As the Court stated in *Faretta*, "[u]nless the accused has acquiesced in such [coerced] representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." *Faretta v. California*, 422 U.S. at 821. There is no indication whatsoever that the petitioner acquiesced to the representation by CPT Coyne and CPT Pretzer. In denying the request for continuance to allow the petitioner further opportunity to obtain civilian counsel and determining that the petitioner was "represented by qualified lawyers," the military judge failed to allow the petitioner an opportunity to respond to his ruling (R. 23).

In contrast to the petitioner in *Faretta*, who did not express any dissatisfaction with the lawyer who represented him and did not allege that his defense was impaired,[9] petitioner continually expressed his dissatisfaction with CPT Pretzer for failing to interview potential defense witnesses. This precludes any inference of acquiescence in appointed counsel's representation (*See* R. 19, 87-88).

It is also apparent that the petitioner did not trust counsel, as evidenced by his decision to testify on the merits a second time against their advice (*See* R. 85-86). Defense counsel's opinion that the petitioner's testimony was "irrelevant" (R. 85) is one indication of the divergent opinions between the petitioner and counsel. Another indication is CPT Pretzer's expression that he had his *own* philosophy regarding the case with which the petitioner did not agree (*See* R. 20). This is

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[9] *See* Faretta v. California, 422 U.S. at 837 n.1 (Burger, C.J., dissenting).

clearly a case where distrust, animosity, and personal differences between petitioner and counsel tainted the trial.[10] In comparison with *Faretta*, the instant petition presents a more compelling example of representation forced upon an unwilling accused. The representation received by the petitioner was the type of "tenuous and unacceptable legal fiction" that the Court sought to protect the criminal defendant against in *Faretta*.[11]

III. PETITIONER SHOULD HAVE BEEN ADVISED BY THE MILITARY JUDGE OF HIS RIGHT TO SELF-REPRESENTATION.

Unlike the defendant in *Faretta*,[12] petitioner did not expressly request to proceed *pro se*. In rejecting his claim that the military judge should have advised him of his right of self-representation, the Court of Military Appeals held that "[u]nless an accused has specifically expressed a desire for self-representation, there is no need for a trial judge to discuss the subject." *United States v. Bowie*, 21 M.J. 453, 456 (C.M.A. 1986). While the question of when an advisement of the right to proceed *pro se* must be given was not addressed by the Court in *Faretta*, the ruling of the Court of Military Appeals is in contravention of the guiding principle in *Faretta* that "[t]he right to appear *pro se* exists to affirm the dignity and autonomy of the accused. . . ." *McKaskle v. Wiggins*, 465 U.S. at 176-177.

To hold that the judge need not present to the accused the option of self-representation after he has repudiated his counsel would leave the criminal defendant in the same straitjacket that the Court found untenable in *Faretta*. The petitioner is cognizant of an existing theory in the federal circuit

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[10] The Court of Military Appeals noted, "[t]he record is replete with indications of Bowie's inability to get along with lawyers." United States v. Bowie, 21 M.J. at 457 n. 3. The Army Court found that "Captain Pretzer revealed he had been relieved by the appellant . . . over a conflict of strategy." United States v. Bowie, 17 M.J. at 823.

[11] Faretta v. California, 422 U.S. at 821.

[12] It is noted that Faretta had represented himself at a prior criminal proceeding and thus, knew of his right to self-representation. *Faretta*, 422 U.S. at 807.

courts that "[w]hile the right to counsel is in force until *waived*, the right of self-representation does not attach until *asserted*." *Brown v. Wainwright*, 665 F.2d 607, 610 (5th Cir. 1982) (en banc). However, under such a theory, the unwitting defendant who clearly does not want appointed counsel is *precluded* from exercising his right under the sixth amendment and 28 U.S.C. § 1654.

The petitioner had no choice in the instant case. He was prevented from obtaining civilian counsel by the denial of his requests for continuance on that basis. He never affirmatively consented to nor acquiesced in the representation of CPT Pretzer and CPT Coyne. He expressly waived his right to military counsel when he discharged his two military attorneys. The military judge placed the petitioner in a situation where he could not obtain civilian counsel of his choice and was forced to proceed to trial represented by counsel he had repudiated.[13] Therefore, advisement of that right to self-representation was essential for an intelligent and binding election by the petitioner whether to accept representation of appointed counsel or to conduct his own defense.[14]

In light of *Faretta* and 28 U.S.C. § 1654, and under the special circumstances of this case, the trial judge should be required to advise the accused of his right to self-

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[13] The military judge could have ruled that CPT Pretzer and CPT Coyne represented petitioner only as "standby" counsel and allowed petitioner to proceed *pro se*, as was the case in *McKaskle*. This would have resolved any concerns the judge may have had as to petitioner's lack of knowledge of courtroom procedures and protocol. Petitioner would have been able to obtain advice on those matters from standby counsel without forfeiting his right to present his *own* defense as he saw fit.

[14] *See* Brown v. United States, 264 F.2d 363, 370 (D.C. Cir. 1959), *cert. denied*, 360 U.S. 911 (1959) (Bazelon, J., dissenting). "[N]ow that *Faretta v. California* is on the books . . . both State and federal judges must make a thorough inquiry into a criminal defendant's knowledge of his Sixth Amendment right to counsel and his additional Sixth Amendment right of self-representation and take all steps necessary to insure the fullest protection of those rights and of the consequences of a defendant's decision to waive counsel and to represent himself." Martin v. Wyrick, 433 F. Supp. 921, 929 (W.D.Mo. 1977), *rev'd*, 568 F.2d 583 (8th Cir. 1978), *cert. denied*, 435 U.S. 975 (1978) (*Faretta* should be applied only prospectively).

representation.[15] Only by imposing such a requirement upon the trial judge can the right of self-representation be fully protected. As the Court has stated:

> The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law.
>
> . . . .
>
> What were contrived as protections for the accused should not be turned into fetters. . . . *To deny an accused a choice of procedure in circumstances in which he, though a layman, is capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.*

Adams v. United States ex rel. McCann, 317 U.S. 269, 279-280 (1942) (emphasis added). The right to self-representation would be relegated to an "empty verbalism" if it is not protected by a prophylactic rule that requires the trial judge, under the circumstances as presented in this case, to advise the accused of the right to proceed *pro se*.

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[15] The questions presented have been addressed in several federal circuit cases where it was held that advisement of the right of self-representation was not required. The cited cases are distinguishable from the instant case because the defendants in those cases had not discharged counsel as petitioner did, or they acquiesced in the representation of counsel, which petitioner did not. *See* Moreno v. Estelle, 717 F.2d 171 (5th Cir. 1983), *cert. denied*, 466 U.S. 975 (1984) (defendant's general dissatisfaction with the representation of counsel that she was not "helpful" and would not "do things for him" did not obligate the trial judge to personally inform defendant of his right to represent himself); Brown v. Wainwright, 665 F.2d at 609-612 (defendant waived his right to self-representation, which was asserted prior to trial, by permitting appointed counsel to conduct his defense and not reasserting that right until late in trial); *see also* United States v. Jones, 514 F.2d 1331 (D.C. Cir. 1975) (pre-*Faretta* decision that held defendant's desire to absent himself from the balance of trial and his failure to express any desire that he may have had to relieve his counsel gave no rise to an occasion for the trial judge to advise him of his right to proceed *pro se*); Soto v. United States, 504 F.2d 1339 (3d Cir. 1974) (pre-*Faretta* decision holding that the trial judge did not err by failing to suggest *pro se* representation when the accused expressed no other reasons for dissatisfaction with counsel's representation than their failure to raise every constitutional claim and his resentment at their requirement that he telephone them daily).

The right to self-representation embodies one of the most cherished ideals of our culture, the right of an individual to determine his own destiny. The petitioner's dissatisfaction with his counsel and apparent lack of confidence in their representation are prime motivations for a defendant's decision to proceed *pro se*. Yet, as a result of the military judge's failure to advise him of that right, the petitioner was precluded from exercising that option. The result was that the petitioner was tried and convicted while represented by unwanted counsel.

IV. THE FAILURE TO ADVISE THE PETITIONER OF HIS RIGHT TO SELF-REPRESENTATION IS NOT AMENABLE TO HARMLESS ERROR ANALYSIS.

The Court of Military Appeals erred by applying a harmless error analysis to the failure of the military judge to advise the petitioner of the right to self-representation. The denial of the right is not amenable to harmless error analysis. *McKaskle v. Wiggins*, 465 U.S. at 177 n.8. "The right is either respected or denied, its deprivation cannot be harmless." *Id.*

Conclusion

For the foregoing reasons, including the importance of the constitutional issue involved, the petition for certiorari should be granted. The questions presented are substantial and of first impression before this Court. Their resolution will be of great significance for the protection of the right to self-representation.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 49057
SPCM 17937

UNITED STATES, APPELLEE,

v.

THOMAS J. BOWIE, JR., SPECIALIST FIVE,
U.S. ARMY, APPELLANT.

March 31, 1986

For Appellant: *Captain Robert S. Johnson, Jr.* (argued); *Colonel William G. Eckhardt, Lieutenant Colonel William P. Heaston, Captain Michael D. Graham; Captain Harry L. Williams, Jr.* (on brief); *Major Eric T. Franzen* and *Captain Lorraine Lee.*

For Appellee: *Lieutenant Colonel Thomas M. Curtis* (argued); *Colonel James Kucera* and *Lieutenant Colonel Adrian J. Gravelle* (on brief).

OPINION OF THE COURT

EVERETT, Chief Judge:

Contrary to his pleas, Bowie was found guilty by a special court-martial military judge of various offenses involving disrespect and willful disobedience, in violation of Articles 89 and 91, Uniform Code of Military Justice, 10 U.S.C. §§ 889 and 891, respectively. His sentence to a bad-conduct discharge, confinement and forfeiture of $367.00 pay per month for 4 months, and reduction to Private E-1 was approved by the convening authority; and the Court of Military Review affirmed the findings and sentence. 17 M.J. 821 (1984)

We granted review on this issue specified by the Court:

> WHETHER THE MILITARY JUDGE ERRED TO ACCUSED'S PREJUDICE BY FAILING TO AP-

PRISE HIM HE HAD A RIGHT TO REPRESENT HIMSELF, WHEN ADVISED THAT ACCUSED HAD DISCHARGED BOTH HIS APPOINTED COUNSEL AND HIS INDIVIDUAL MILITARY COUNSEL OR SECURE HIS AFFIRMATIVE CONSENT TO CONTINUED REPRESENTATION BY ONE OR ALL OF THE STATED COUNSEL.

I

On December 11, 1981, Judge James E. Noble conducted an out-of-court session where Captain James Coyne and Captain Herbert Irish, the appointed defense counsel and assistant defense counsel, were both present. Upon being informed by the judge of his rights to counsel, appellant requested that he be represented by a Captain Richard Boone. However, after some inquiry, it appeared that Captain Boone was a Chaplain and that, although he had some legal training at a law school, he had not received a law degree.[1] The military judge informed Bowie that the Manual for Courts-Martial precluded his representation by a nonlawyer. *See* para. 61*f*(3), Manual for Courts-Martial, United States, 1969 (Revised edition).[2] Thereupon, appellant indicated that he wished to obtain a civilian counsel; and the case was continued until January 28, 1982.

As Judge Noble emphasized to appellant:

> I want to point out to you further that you cannot thwart or stop the process of the courts-martial from going on simply by not having a lawyer. I'm affording you opportunity to obtain a civilian counsel, and should you not obtain a civilian counsel, the court will proceed, whether you like it or not, with your detailed defense counsel defending you.

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[1] According to Captain Boone, he had 60 hours of credit and needed 30 more hours. Although he indicated that the law school which he had attended was accredited by the American Bar Association, the assistant defense counsel stated that, according to information in the *Martindale-Hubbell Legal Directory*, it was not.

[2] *See also United States v. Kraskouskas*, 9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958).

Bowie indicated his understanding of this advice and acknowledged that he had been given "fair time" to obtain a lawyer.

When the court reconvened on February 16, 1982, Judge Richard J. Hough was presiding, and Captain Coyne, the appointed defense counsel, was representing appellant along with Captain Randall E. Pretzer, individual defense counsel. Captain Irish had been excused as assistant defense counsel; and, upon inquiry by the judge, Captain Coyne stated that Irish had not at any time formed an attorney-client relationship with the accused.

The judge reviewed with appellant his rights to counsel and then inquired, "Are you satisfied to have Captains Pretzer and Coyne act as your only lawyers in this case?" Bowie responded in the negative and explained:

> I don't feel that my case have [sic] been well prepared for the reason being that there are witness [sic] stateside that are not here. There are witness [sic] still here in Germany at least two I know of for a fact that have not been talked to by the defense.

Responding to a question by Judge Hough, the individual defense counsel, Captain Pretzer, stated:

> I've interviewed numerous witnesses on this case and made an effort to contact some of those people in the States and with no avail. I had my own philosophy on this particular case and theory which I want to pursue and I've tried to discuss this with Specialist Bowie and have gotten nowhere whatsoever. He has told me as of this last Friday that he did not want my services anymore. Since I have been somewhat if you will fired by the man, I feel no need to represent him anymore and I request at this time to be excused from the case. Furthermore, Specialist Bowie has related to me that he wishes to hire civilian counsel and I said, "That's fine" and I talked to him about some of the counsel on the list.

Nonetheless, in answer to further questions, Pretzer indicated that he was prepared to go to trial at the time and felt that he "had enough time and opportunity to discuss this case with . . . [Bowie] and to discuss the case with the witnesses, the relevant witnesses involved."

Captain Coyne, the appointed defense counsel, stated that he lacked adequate opportunity to prepare the case and gave this explanation:

> Since I first interviewed Specialist Bowie back on the 24th of November I advised him of the rights to counsel. At that time he asked me to request individual defense counsel. Since that time there have been two requests for individual defense counsel. He has hired and fired a civilian counsel. During this whole time he has not – he has indicated to me that he did not wish to discuss this case with me.

Coyne then filed with the court documents which appellant had executed on February 5, 1982, and which released him and Captain Irish as defense counsel because Captain Pretzer had been made available as individual defense counsel.

Thereafter, the judge reviewed with counsel the various steps taken to provide appellant representation to his liking. These included an effort to obtain a civilian lawyer, Robert J. Fiore, in Frankfurt, and the appointment of Captain Pretzer as individual defense counsel. Despite a two-week continuance for Pretzer to interview witnesses, appellant wanted a further continuance in order to make a further effort to hire a civilian attorney. Trial counsel resisted this effort because the Government had "three stateside witnesses present here today for this trial." The judged then stated:

> Specialist Bowie, I think you're represented by qualified lawyers and I'm not going to let you delay this trial anymore. So any request for continuance at this time to seek further attornies is denied. It appears that counsel for both sides have the requisite qualifications and all personnel of the court required to be present have been sworn. Additionally I'd add to that I strongly urge you to cooperate with their assistance, the assistance that they're going to be providing you and the assistance they are providing you. They can help you alot I'm sure in this case.

Shortly thereafter, the judge reiterated:

> Now Specialist Bowie, I want to also again encourage you to cooperate with your defense counsels. If you feel like you need more time during the course of your trial to discuss what's occurring in the trial, please ask me for time. I'll give you reasonable time to talk to your lawyers.

After a brief recess the trial continued before Judge Hough, appellant having requested trial by judge alone. Examination, cross-examination, and argument were conducted by Captain Pretzer, the individual defense counsel, although Captain Coyne apparently was present at all times.

While the Government was presenting its case-in-chief, this colloquy occurred:

> IDC During the recess, Your Honor, a note was handed to me which was taken by one of the court personnel wherein Mrs. Bowie, the wife of the accused here Specialist Bowie, had contacted the office of Waco Carter and spoke I believe to a Mr. Bill Smith. Mr. Bill Smith had relayed a message to the personnel that he was interested to the best of my knowledge in representing Bowie but Bowie had to contact him first and I just wanted to bring that note to the attention of the court, Your Honor.
>
> MJ Well, do I understand – do I understand you as trying to make a motion again for a continuance in this case until your client talks with Mr. Smith?
>
> IDC Yes, Your Honor.
>
> MJ It's my understanding that your client has not talked with Mr. Smith previous to this time. Is that correct?
>
> IDC That's correct, Your Honor.
>
> MJ Is that correct, Specialist Bowie?
>
> ACC Sir, I contacted this firm and it should be on a recording of yesterday on a recording but I could not able talk [sic] to that person but it's on the recorder.
>
> MJ Very well. Well, my ruling still stands.

II

The sixth amendment grants an accused the right to the assistance of counsel in his defense. In light of this language, the Supreme Court ruled in *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), over strong dissent, that a defendant has a constitutional right to conduct his own defense. "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Id.* at 819-20, 95 S.Ct. at 2533, 45 L.Ed.2d 562. This right of self-representation was reaffirmed in *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), where the Court also established standards for the participation of standby counsel.

Although the right of self-representation was not referred to in the Uniform Code, which was enacted long before the decision in *Faretta*, we do not see any reason why it should be absent from military justice. Certainly no military exigency would require its absence. Therefore, we conclude that a military accused who so chooses may "go it alone," release his counsel, and appear *pro se*.

This, however, is a risky course to follow; and generally judges warn defendants about the risks implicit in representing themselves at a criminal trial. For this reason, it has been held that where a defendant is considering self-representation, the presiding judge should explain to him on the record

> that it is advisable to have a lawyer, because of his special skill and training in the law and that the judge believes it is in the best interest of the defendant to have a lawyer, but that he may, if he elects to do so, waive his right to a lawyer and conduct and manage his defense himself. . . . In other words, there must be a record sufficient to establish to our satisfaction that the defendant "knows what he is doing and his choice is made with his eyes open."

United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964). Moreover, the appointment of standby counsel, to whom the accused may turn for advice or who may take over the

defense for him if he finds himself overwhelmed by the complexity of self-representation, is a precaution used by many judges. *See McKaskle v. Wiggins, supra.*

Bowie's complaint, however, is not that he was allowed to undertake self-representation without proper warning or assistance but instead that he was deterred from representing himself by the judge's failure to advise him specifically that he could discharge his two lawyers and represent himself. According to appellate defense counsel, the failure to advise appellant of his right to self-representation negated the existence of that right.

We have been cited no precedent which requires giving notice to an accused that he is entitled to represent himself. Even though the Manual for Courts-Martial does recognize the right of self-representation, it does not provide for any warning as to that right. Likewise, military precedent does not demand that an accused be advised that he may represent himself. *See United States v. Tomberlin*, 5 M.J. 790 (A.C.M.R.1978); *United States v. Stoutmire*, 5 M.J. 724 (A.C.M.R.1978). Not every constitutional right requires that it be accompanied by a warning of its existence. For example, the protection of fourth-amendment rights does not require specific warning that one need not consent to a request to search his property. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

Self-representation is such a dangerous course of action for an accused and in most instances so contrary to efficient judicial administration that the dissenters in *Faretta* were unwilling to acknowledge its existence. The same concerns which they expressed lead us to believe that, absent binding precedent to the contrary, we should not impose any requirement that would tend to encourage utilization of the right of self-representation. Unless an accused has specifically expressed a desire for self-representation, there is no need for a trial judge to discuss the subject. Accordingly, we reject Bowie's claim that his right to self-representation was violated.

If however, we had concluded that, by failing to advise of the right to self-representation, the military judge had committed error – even of constitutional dimensions – we would

be convinced beyond a reasonable doubt that it was harmless. *Cf. United States v. Remai*, 19 M.J. 229 (C.M.A.1985). The risk of injury to an accused's interest by reason of unwanted interference by appointed counsel with his self-representation is less in a trial by judge alone – as here – than in a trial before members. *Cf. McKaskle v. Wiggins, supra.* Furthermore, some of the documents filed in connection with a post-trial attack by Bowie on the competence of his counsel make clear that in this case he was his own worst enemy.[3] His dissatisfaction with his counsel apparently stemmed initially from their recommendation that he seek an administrative discharge, rather than undergo a trial by court-martial. As later events demonstrated, this recommendation was quite sound. At trial Bowie insisted on taking the stand despite his counsel's recommendation to the contrary. As they feared, the cross-examination of appellant when he testified undercut any meager hope of acquittal and tended to enhance the sentence.

Commendably Judge Noble and Judge Hough made every reasonable effort to provide appellant a lawyer to his liking. However, they could not delay trial indefinitely while Bowie hired and fired attorneys. Even when he denied any further continuance, Judge Hough went the extra mile by keeping Captain Coyne, the appointed defense counsel, in court as a standby counsel, even though Captain Pretzer, the individual defense counsel, was present to represent appellant. In view of all of the circumstances and from our examination of the record, we are sure that Bowie received a fair trial in which his rights were scrupulously protected.

The decision of the United States Army Court of Military Review is affirmed.

Judge COX concurs.

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[3] The record is replete with indications of Bowie's inability to get along with lawyers. This inability, in turn, may reflect the same attitudes that led to commission of the offenses of which he was convicted.

APPENDIX B

UNITED STATES ARMY
COURT OF MILITARY REVIEW

SPCM 17937

UNITED STATES, APPELLEE,

v.

SPECIALIST FIVE THOMAS J. BOWIE, JR., SSN 424-66-7891,
UNITED STATES ARMY, APPELLANT

30 Jan. 1984.

Captain Michael D. Graham, JAGC, argued the cause for the appellant. With him on the brief were Colonel William G. Eckhardt, JAGC, and Lieutenant Colonel Paul J. Luedtke, JAGC.

Captain David A. Brown, JAGC, argued the cause for the appellee. With him on the brief were Colonel James Kucera, JAGC, Lieutenant Colonel Thomas M. Curtis, JAGC, and Captain Jessica A. Polley, JAGC.

Before MOUNTS, YAWN and WERNER, Appellate Military Judges

OPINION OF THE COURT

WERNER, Judge:

Contrary to his pleas, the appellant was convicted of two specifications each of being disrespectful to and disobeying the order of a noncommissioned officer, and one specification of being disrespectful to a superior commissioned officer, in violation of Articles 91 and 89, Uniform Code of Military Justice, 10 U.S.C. §§ 891 and 889. His sentence to a bad-conduct discharge, confinement at hard labor for four months, forfeiture of $367.00 pay per month for four months, and reduction to Private E-1 was approved by the convening authority.

The appellant contends, *inter alia*, he was denied effective assistance of counsel; the military judge erred by denying his motion for a continuance; and the post-trial review is prejudicially inaccurate. We affirm.

The offenses occurred in the Federal Republic of Germany and arose out of two separate incidents which were the result of the appellant's resentment of his superiors' decision to relieve him of certain leadership responsibilities and their order that he work for a person of a lower grade. On 11 December 1981, the initial Article 39(a)[1] session of the appellant's trial was held and attended by him and his detailed defense counsel, Captains Coyne and Irish. After the appellant was informed of his rights to counsel, he requested that a Captain Richard Boone, U.S. Army, be made available to defend him. After learning that Captain Boone was not an attorney, the military judge, citing paragraphs 48*a* and 61*f* of the Manual for Courts-Martial, United States, 1969 (Revised edition), correctly ruled that Boone was not qualified to represent the appellant. *See United States v. Kraskouskas*, 9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958). The appellant then told the military judge he wanted to retain civilian counsel, and was granted a continuance until 28 January 1982.

In the interim, the appellant relieved Captain Irish as his counsel, and told Captain Coyne he did not want to employ his services either. A Captain Pretzer was made available to serve as the appellant's individual military counsel and an additional delay of several weeks was granted so he could prepare for the trial. The appellant also continued his efforts to retain civilian counsel.

On 16 February 1982, the appellant appeared at an Article 39(a) session with Captains Pretzer and Coyne and informed the military judge he was dissatisfied with their efforts on his behalf by stating,

> The reason, sir, I don't feel that my case have [sic] been well prepared for the reason being that there are witnesses stateside that are not here. There are witnesses still here in Germany at least two I know of for a fact that have not been talked to by the defense.

---

[1] Article 39(a), Uniform Code of Military Justice, 10 U.S.C. § 839(a).

Captain Pretzer replied he had interviewed all the witnesses named by the appellant except a few he had unsuccessfully attempted to locate that had returned to the United States. Captain Pretzer revealed he had been relieved by the appellant four days earlier over a conflict of strategy. Captain Coyne then introduced two documents signed by the appellant releasing him and Captain Irish as his attorneys.

The military judge asked if counsel were ready to proceed with the trial; Captain Pretzer replied affirmatively, but Captain Coyne responded, "No," noting that the appellant had refused to discuss the merits of the case with him.

The military judge then asked the appellant,

> MJ Now you indicated or your counsel indicated for you that you wanted to seek a continuance to hire another civilian attorney. Is that right?
>
> ACC Yes, Sir.
>
> MJ Who is that civilian attorney?
>
> ACC It was from the Bellen firm or the Carter firm or one of the other firm [sic]. I haven't had time to really find just who but one of the firms.
>
> MJ Have you talked to anybody with any of those firms?
>
> ACC No, Sir. Only on a tape recorder, couldn't catch up with no one at the office or home, his home.

The military judge denied the motion for a continuance and the trial proceeded with the appellant represented throughout by Captains Pretzer and Coyne. The defense called only one witness, the appellant. During the appellant's testimony on the merits, he revealed, to the chagrin of his counsel, that a year before he had been convicted by a special court-martial. Captain Coyne had reviewed the appellant's earlier trial and conviction pursuant to Article 65(c), Uniform Code of Military Justice, 10 U.S.C. § 865(c), and had signed its promulgating order. Before sentencing, that promulgating order was admitted into evidence without objection.

I. Adequacy of Counsel

At a special or general court-martial the accused is entitled to "reasonably competent counsel who exercises that competence in his client's behalf throughout the trial." *United States v. Jefferson*, 13 M.J. 1, 5 (CMA 1982) (citations omitted). *United States v. Rivas*, 3 M.J. 282 (CMA 1977). To prevail on a claim of ineffective assistance of counsel, an appellant must first prove that his attorney failed to perform with the degree of skill and diligence with which a competent attorney would perform under similar circumstances. *United States v. Koonce*, 16 M.J. 660, 662 (ACMR 1983), and cases cited therein. Secondly, the appellant must establish that he was materially prejudiced in the defense of his case by his counsel's incompetence. *United States v. Black*, 16 M.J. 507, 509 (AFCMR 1983); *United States v. Owens*, 12 M.J. 817, 819 (NMCMR 1981), *pet. denied*, 13 M.J. 220 (CMA 1982). *See generally Armstead v. Maggio*, 720 F.2d 894 (5th Cir. 1983); *United States v. French*, 719 F.2d 387, 389 (11th Cir. 1983); *Knott v. Mabry*, 671 F.2d 1208, 1210 (8th Cir.), *cert. denied*, __ U.S. __, 103 S.Ct. 115 (1982); *United States v. DeRosa*, 670 F.2d 889, 896 (9th Cir. 1982); *Nevels v. Parratt*, 596 F.2d 344 (8th Cir. 1979). The appellant has failed on both counts.

A. Captain Pretzer

The appellant attacks Captain Pretzer's performance on several grounds. First, he baldly asserts that Captain Pretzer inadequately investigated his case by failing to interview witnesses who allegedly would have testified that his supervisory sergeants had subjected him to abusive treatment, thereby forfeiting the special privilege of respect which Article 91 of the Code confers upon noncommissioned officers. *See, e.g., United States v. Cheeks*, 43 C.M.R. 1013, 1016 (AFCMR 1971). Obviously, "representation involves more than the courtroom conduct of the advocate. The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange

for their attendance." *Moore v. United States*, 432 F.2d 730, 739 (3d Cir. 1970) (footnote omitted). *United States v. Dupas*, CM 440507, __ M.J. __ (ACMR 6 December 1983); *Gaines v. Hopper*, 575 F.2d 1147 (5th Cir. 1978); *see Baty v. Balkcom*, 661 F.2d 391 (5th Cir. 1981), *cert. denied*, 456 U.S. 1011 (1982). However, the appellant's contention fails because he has not proven who was not interviewed nor produced any matter which establishes they would have provided relevant, beneficial evidence. *United States v. McMillan*, 606 F.2d 245 (8th Cir. 1979) (even if counsel improperly neglected to interview witnesses whose names were furnished by defendant, appeal rendered unsuccessful by failure to show prejudice); *cf. Langston v. Wyrick*, 698 F.2d 926, 932 (8th Cir. 1982) (counsel was not ineffective by failing to interview a witness whose testimony he had no reason to believe would be useful or helpful). Moreover, Captain Pretzer, in a post-trial affidavit, states he interviewed as many of the persons named by the appellant as he could find and all of them would have testified favorably for the Government. *See United States v. DeCoster*, 624 F.2d 196, 209 (D.C. Cir. 1976) (en banc) (duty to investigate must be considered in light of information supplied to him by his client).

The appellant also claims that Captain Pretzer was ineffective by failing to call certain witnesses on his behalf. We disagree. The decision "on what witnesses to call, . . . and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client." *Standards for Criminal Justice* § 4-5.2(b) (2d ed. 1980). *United States v. Combest*, 14 M.J. 927, 932 (ACMR 1982); *United States v. Jones*, 14 M.J. 700 (NMCMR 1982); *United States v. Long*, 674 F.2d 848 (11th Cir. 1982); *see also Eldridge v. Atkins*, 665 F.2d 228, 236 n.5 (8th Cir. 1981), *cert. denied*, 456 U.S. 910 (1982) (counsel could not call alibi witness if he reasonably believed witness would not help client); *United States v. Miller*, 643 F.2d 713 (10th Cir. 1981). *See generally United States v. Zylstra*, 713 F.2d 1332, 1338-39 (7th Cir. 1983). As we have said numerous times, we will not second guess a defense counsel's tactical decisions merely because they were unsuccessful. *See, e.g., United States v. Koonce, supra; United States v. Gholston*, 15 M.J. 582, 584 (ACMR),

pet. denied, 16 M.J. 125 (CMA 1983). *See also United States v. Rivas, supra; Ford v. Strickland*, 676 F.2d 434 (11th Cir. 1982), *cert. denied*, __ U.S. __, 104 S.Ct. 201 (1983); *United States v. Mayo*, 646 F.2d 369 (9th Cir.), *cert. denied sub nom., Dondich v. United States*, 454 U.S. 1127 (1981); *Beckham v. Wainwright*, 639 F.2d 262, 265 (5th Cir. 1981); *United States v. Kearney*, 560 F.2d 1358, 1368 (9th Cir.), *cert. denied*, 434 U.S. 971 (1977).

B. Captain Coyne

The appellant's contention that he was unfairly prejudiced by Captain Coyne's continued representation of him after Captain Coyne admitted he was not ready to proceed to trial is without merit. Captain Coyne's lack of preparation was the product of the appellant's refusal to cooperate with him. *Cf. United States v. Roberts*, 14 M.J. 584, 587 (NMCMR 1982) ("where an accused's unauthorized absence hinders his defense counsel in adequately representing him, he will not be heard to complain"). While we are somewhat baffled by the military judge's refusal to excuse Captain Coyne as the appellant's counsel under these circumstances, any error was nonprejudicial since Coyne did not act adversely to the appellant's interests and did little more than sit at the counsel's table during the trial. Moreover, Captain Pretzer provided the appellant with a vigorous, effective defense. *See United States v. Urbina*, 14 M.J. 962, 966 (ACMR 1982) ("competency of counsel must be measured by the combined efforts of the defense team").

The appellant also alleges that he is "distressed" that Captain Coyne did not disclose to him that he had a conflict of interest, i.e., that Captain Coyne had performed the supervisory review of his trial and conviction by a special court-martial a year earlier. Captain Coyne disputes the appellant's charge and says he informed the appellant of this matter before the trial on two occasions. Regardless, we find no prejudice since Captain Coyne was only nominally the appellant's counsel; the appellant was competently represented by another attorney; the record does not reveal anything which indicates the promulgating order was inadmissible; and the

appellant had revealed the existence of his conviction during his testimony on the merits, contrary to the advice of his counsel. However, Captain Coyne should have disclosed this information in open court so the factual dispute we now face could have been avoided. Furthermore, the military judge should have inquired into the matter when the promulgating order, with Captain Coyne's signature plainly evident, was offered into evidence. *Cf. United States v. Taylor*, 13 M.J. 740 (ACMR 1982).

One other matter warrants discussion. The appellant impliedly asserts that the military judge erred by compelling him to accept counsel he did not want. We do not agree. When the trial reconvened on 16 February 1982, the appellant's options regarding counsel were limited. Although granted ample opportunity to retain civilian counsel, he had not done so. He also had been detailed two defense counsel and assigned an individual military counsel. Article 38(b), Uniform Code of Military Justice, 10 U.S.C. § 838(b), affords an accused the right to only one military attorney of his choice. *United States v. Kilby*, 3 M.J. 938, 943 (NCMR), *pet. denied*, 4 M.J. 139 (CMA 1977). Moreover, in light of the delays generated by the appellant, we do not believe the military judge would have abused his discretion by denying the appellant an additional continuance to obtain substitute counsel if Captains Pretzer and Coyne had been relieved from representing him. *United States v. Montoya*, 13 M.J. 268, 274 (CMA 1982). In short, the appellant was left with the choice of proceeding to trial with either or both Captains Coyne and Pretzer or by himself. Since the appellant did not request to represent himself,[2] we find no error. Regardless, in light of Captain Pretzer's vigorous defense of the appellant and the overwhelming evidence of guilt, we find no prejudice. *United States v. Jordan*, 22 U.S.C.M.A. 164, 165-66, 46 C.M.R. 164, 165-66 (1973).

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[2] Although the military judge was not obliged to inform the appellant of his right to represent himself, United States v. Tomberlin, 5 M.J. 790 (ACMR 1978); United States v. Stoutmire, 5 M.J. 724 (ACMR 1978), we believe it would have been wise of the military judge to have so advised the appellant, and to have told him of his limited choice of counsel.

II. Denial of Motion for a Continuance

The appellant contends the military judge abused his discretion by denying his motion for a continuance thereby depriving him of his right to civilian counsel. During the initial Article 39(a) session on 11 December 1981, the appellant was granted a continuance of seven weeks. Moreover, after the military judge granted the continuance and determined that the appellant was not subject to any pretrial restraints, he warned the appellant,

> And I want to point out to you further that you cannot thwart or stop the process of the courts-martial [sic] from going on simply by not having a lawyer. I'm affording you opportunity to obtain a civilian counsel, and should you not obtain a civilian counsel, the court will proceed, whether you like it or not, with your detailed defense counsel defending you. Do you understand?
> ACC: I understand, sir.
> MJ: Any questions?
> ACC: No, sir.
> MJ: Does that give you fair time to do what you want to do?
> ACC: Yes, sir.

When the trial reconvened more than two months later, the appellant had not hired a civilian attorney and was unable to name the law firm or attorney he wished to retain. Moreover, the Government had brought several witnesses from the United States who were standing by, ready to testify. Under these circumstances, the military judge did not abuse his discretion by denying the appellant's motion for a continuance. *United States v. Jordan*, 22 U.S.C.M.A. at 167, 46 C.M.R. at 167; *United States v. Kinard*, 21 U.S.C.M.A. 300, 45 C.M.R. 74 (1972); *United States v. Brown*, 10 M.J. 635 (ACMR 1980); *United States v. Lewis*, 8 M.J. 838 (ACMR 1980); *see United States v. Johnson*, 12 M.J. 670 (ACMR 1981), *pet. denied*, 13 M.J. 112 (CMA 1982).

III. The Post-Trial Review

The staff judge advocate's post-trial review inaccurately advised the convening authority that the appellant's entire chain of command had recommended trial by a special court-martial empowered to adjudge a bad-conduct discharge when his company and battalion commanders had recommended trial by a special court-martial without such power. The trial defense counsel did not note the error in his rebuttal to the review. Applying the rule of waiver will not result in a "manifest miscarriage of justice." *United States v. Myhrberg*, 2 M.J. 534, 537 n.10 (ACMR 1976) (en banc). *See United States v. Johnson*, 8 M.J. 634 (ACMR 1979). Accordingly, we find the assigned error without merit.

The remaining assignments of error are also without merit.

The findings of guilty and the sentence are affirmed.

Senior Judge MOUNTS and Judge YAWN concur.

For the Court:

/s/ WILLIAM S. FULTON, JR.

William S. Fulton, Jr.
Clerk of Court

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